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IN THE
COURT OF APPEALS OF INDIANA

WILLIE KEMP WALKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0705-CR-223
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0507-FB-88

October 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Willie Kemp Walker appeals his conviction of robbery, a Class B felony,[1] and the finding he is an habitual offender.[2] Because he used force against the Pizza King store manager before leaving the parking lot with the cash register, the evidence is sufficient to prove he committed robbery. Neither can we reverse his habitual offender enhancement, as Walker knowingly waived his right to a jury trial as to that charge and may not otherwise challenge his guilty plea on direct appeal. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 23, 2005, Walker, Kimberly Springer, and Scarlett Brainerd went to a Pizza King in Fort Wayne. After ordering carry-out food, the three sat in Springer's Blazer waiting for the food to be cooked. While in the Blazer, Walker and Springer decided to steal the cash register. Springer pulled the Blazer up to the side door of the building, and she and Walker left their doors open and went inside. Walker grabbed the register off the front counter, and they ran back to the Blazer. Walker threw the register in the back seat and climbed in the back. Springer got in the driver's seat and attempted to drive away.

Springer was unable to do so because the manager of the store, Richard Judge, chased them out of the store and managed to get half-way into the driver's seat with Springer. Richard had a foot on the brake and was holding the steering wheel. Richard's brother, Kenneth, came out of the store to help. Walker and Springer began hitting and biting Richard to try to get him out of the car. Walker then jumped out of the back seat,

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[1] Ind. Code § 35-42-5-1.
[2] Ind. Code § 35-50-2-8.

shoved Kenneth, and tried to pull Richard out of the front seat. Kenneth was attempting to grab the register from the back seat when the Blazer lurched into reverse and slammed into the building, pinning Richard between the building and the Blazer. Kenneth fell underneath the doors, but managed to avoid being run over. Springer was then able to drive away. Both Judge brothers had bruises, scrapes, and abrasions from their attempts to stop the robbery.

The State charged Walker with robbery and with being an habitual offender. A jury heard evidence regarding the robbery charge. At the close of evidence, prior to closing arguments and jury instructions, the following exchange occurred outside the presence of the jury:

> COURT: Do you want to take care of this Habitual issue?
> [Defense]: We can do that.
> COURT: Mr. Walker, you are charged by a separate information with being an Habitual Offender . . . . Do you understand that information?
> [Walker]: Yes.
> COURT: As I'm sure that we have discussed in the past, and you've discussed with your counsel, you're entitled to a jury determination on the issue of whether or not you are an Habitual Offender, do you understand that?
> [Walker]: Yes.
> COURT: Your counsel has indicated this morning that you wish to waive your right to trial by jury on the issue of Habitual Offender and admit that you are an Habitual Offender, is that right?
> [Defense]: I wish to state for Mr. Walker's benefit that this admission, if he is found not guilty, this admission has no criminal - -
> COURT: Has no criminal impact.
> [Defense]: What so ever [sic]. Is that your question?
> [Walker]: Yes.
> [Defense]: It has no significance.
> COURT: That's correct.
> [Walker]: That's fine.

COURT: But if you're found guilty, then you would have a right to a jury determination on the Habitual which you are indicating you wish to waive and to admit that you are guilty and have been convicted of these two past acts, Burglary and Receiving Stolen Property. Is that right?
[Walker]: Yes.

(Tr. at 279-80.) Walker admitted those convictions, and the State offered certified records proving the convictions. After hearing closing arguments and final instructions, the jury found Walker guilty of robbery. The court entered the conviction of robbery and gave Walker a twelve-year sentence. The court also entered a finding Walker was an habitual offender and enhanced his sentence by thirty years.

DISCUSSION AND DECISION

1. Robbery

When a defendant challenges the sufficiency of evidence to support his conviction, we must affirm if the facts most favorable to the judgment and the reasonable inferences therefrom would permit a reasonable jury to find the defendant guilty beyond a reasonable doubt. *Winn v. State*, 748 N.E.2d 352, 357 (Ind. 2001). When conducting our analysis, we may neither reweigh the evidence nor reassess the credibility of the witnesses. *Id.*

Walker was convicted of robbery as a Class B felony:

> A person who knowingly or intentionally takes property from another person or from the presence of another person:
> (1) by using or threatening the use of force on any person; or
> (2) by putting any person in fear;
> commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon.

Ind. Code § 35-42-5-1.

Walker claims he could not be convicted of robbery because his "taking" was completed before he used force. Indiana Supreme Court precedent directly on point undermines his argument:

> Coleman entered a Marsh supermarket in Muncie and proceeded to the video rental counter. At the counter, Coleman instructed a customer, Joe Williamson, to keep quiet while he pocketed five rolls of film. As Coleman was leaving the store, Williamson told a sales person what had happened, and the salesperson alerted one of the store's co-managers, Max Smith. Smith followed Coleman just outside the store, where Coleman was still standing at the store's entrance. Seeing the film protruding from Coleman's pocket, Smith asked Coleman if he had forgotten to pay for anything. Coleman then pulled a knife and threatened Smith, saying "do you want some of this." Fearing that Coleman would stab him, Smith retreated into the store. The police later arrested Coleman when he returned to the store.

Coleman v. State, 653 N.E.2d 481, 482 (Ind. 1995). When affirming Coleman's conviction of robbery, our Supreme Court provided the following analysis:

> We agree with Coleman that if the "taking" was completed before Smith confronted him in front of the store, then he did not commit robbery as defined by our statute. At most, Coleman would be guilty of theft, which requires only the unauthorized exertion of control over the property of another with intent to deprive that person of the property, Ind. Code Ann. § 35-43-4-2 (West 1986), and perhaps an additional offense for threatening Smith with the knife.
>
> We have previously held, however that a "taking" is not fully effectuated if the person in lawful possession of the property resists before the thief has removed the property from the premises or from the person's presence. . . . .
>
> . . . Coleman could not have perfected the robbery without eluding Smith. Smith confronted Coleman before he left the premises and thus presented an obstacle to the taking itself. As Judge Kirsch argued in dissent to the opinion in the Court of Appeals, Coleman was only successful in removing the items from the premises and from Smith's presence by threatening him with the knife. As such, Coleman's use of force was necessary to accomplish the theft of the film and was thus part of the robbery.

Id. at 482-83 (internal citations omitted).

Walker had placed the cash register in the back of Springer's Blazer, and she was attempting to drive away when the Judge brothers interfered. During the melee that ensued, the Blazer was shifted into reverse, backed into the building, and pinned Richard between the building and the Blazer. Only after injuring both brothers were Walker and Springer able to drive away from the scene. The evidence was sufficient to convict Walker of robbery. *See id*. at 483; *see also Young v. State*, 725 N.E.2d 78, 81 (Ind. 2000).[3]

2. Habitual Offender

Walker claims the trial court used an erroneous procedure when finding him an habitual offender. For a number of reasons, we cannot find reversible error.

First, to the extent Walker's "admission" (Tr. at 282) of the underlying crimes could be seen as a guilty plea, Walker may not challenge that plea on direct appeal. *See Tumulty v. State*, 666 N.E.2d 394, 396 (Ind. 1996).

Next, to the extent Walker's admissions could be seen as occurring in the context of a bench trial, Walker's counsel suggested this quick resolution, (*see* Tr. at 279) ("Your counsel has indicated this morning that you wish to waive your right to trial by jury on the issue of Habitual Offender and admit that you are an Habitual Offender."), and

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[3] In *Young*, our Indiana Supreme Court explained:

> The snatching of money, exertion of force, and escape were so closely connected in time (to sprint from house to running car parked outside), place (from door to alley), and continuity (in stealing money, then attempting to escape with it), that we hold Young's taking of property includes his actions in effecting his escape.

725 N.E.2d at 81.

Walker himself agreed this was what he wished to do. *See Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) (Under the doctrine of invited error, "a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct.").

Neither do we believe Walker's waiver of his right to jury trial was ineffective. "The right to trial by jury applies in habitual offender proceedings." *Gonzalez v. State*, 757 N.E.2d 202, 204-05 (Ind. Ct. App. 2001), *trans. denied* 774 N.E.2d 505 (Ind. 2002). For the waiver of this right to be valid, the record must demonstrate the defendant affirmatively expressed his desire to waive this fundamental right. *Id.* at 205. A knowing, voluntary, and intelligent waiver can occur either in written waiver or in court colloquy. *Id.* In the exchange between Walker, counsel, and the court quoted above, Walker affirmatively expressed his desire to waive his right to a jury trial.

Affirmed.

DARDEN, J., and CRONE, J., concur.